1971

Hal E. Holmstead v. Abbott G. M. Diesel, Inc. : Appellant's Brief

Utah Supreme Court

In the Supreme Court of the State of Utah

HAL E. HOLMSTEAD,
Plaintiff and Respondent,

vs.

ABBOTT G. M. DIESEL, INC.,
Defendant and Appellant.

Case No. 12257

APPELLANT'S BRIEF

Appeal from Order of the Fourth District Court for Utah County
Honorable Joseph E. Nelson, Judge

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In the Supreme Court of the State of Utah

HAL E. HOLMSTEAD,
Plaintiff and Respondent,

vs.

ABBOTT G. M. DIESEL, INC.,
Defendant and Appellant.

Case No. 12257

APPELLANT'S BRIEF

NATURE OF CASE

This is an action against an employer to recover damages for injuries allegedly sustained in a collision in which an employee of the employer was involved.

DISPOSITION IN LOWER COURT

Defendant-appellant's (hereinafter referred to as defendant) Motion for Summary Judgment was denied by the trial court. This Court granted defendant's petition for intermediate appeal.

RELIEF SOUGHT ON APPEAL

Defendant seeks a determination by this Court that the covenant not to sue executed by plaintiff-respondent

(hereinafter referred to as plaintiff) in favor of defendant's employee is a bar to the claim against the employer.

STATEMENT OF FACTS

The facts are simple and undisputed. This suit arises out of an accident which occurred December 6, 1968, at the intersection of Lehi Main Street and the frontage road to I-15 near Lehi in Utah County, Utah. A vehicle owned and driven by plaintiff collided with a vehicle owned and driven by one Gideon Allen. At the time and place of the accident Gideon Allen was an agent and employee of the defendant, Abbott GM Diesel, Inc., operating his said vehicle and acting within the scope of his employment. Plaintiff therefore seeks to hold defendant liable under the doctrine of master and servant or respondeat superior. No independant or active negligence is alleged on the part of Abbott GM Diesel, Inc.

Suit was commenced by filing of the Complaint on April 17, 1969 (R. 3) and Summons was served April 18, 1969 (R. 5). The employee Gideon Allen was not and has not been named as a party to this action.

On July 7, 1969 in consideration of the payment in behalf of said Gideon Allen of $10,000, plaintiff executed and delivered a simple covenant not to sue in which he did "covenant and agree never to make any demand or

claim, or commence or cause or permit to be prosecuted any action at law or in equity, or any proceeding of any description, against Gideon Allen because of personal injury, disability, property damage, loss of services, expense or loss of any kind . . . sustained . . . in consequence of an accident that occurred on or about the 6th day of December, 1968 at or near Lehi, Utah." (R. 31.)

On October 29, 1970 Abbott GM Diesel, Inc. filed a Motion for Summary Judgment based upon the pleadings, depositions and records on file and an affidavit of Reed L. Martineau, which showed the undisputed facts as set out above (R. 27-31).

Following four hearings on November 14, 1969 (R. 46), December 12, 1969 (R. 47), December 19, 1969 (R. 51) and January 2, 1970 (R. 54) on the Motion for Summary Judgment, the plantiffs in January, 1970, independently commenced an action in the District Court of Utah County, Utah against Gideon Allen and Allstate Insurance Company for reformation of the covenant not to sue dated July 7, 1969. Defendant Abbott GM Diesel, Inc. was not made a party to that action even though its interest was known to plaintiff's counsel. A Decree of Reformation was entered upon the default of Gideon Allen and Allstate Insurance Company on March 11, 1970 (R. 32-34). By the Decree of Reformation the following paragraph was added to the covenant not to sue, which otherwise was left unchanged:

> "I hereby reserve all of my rights against Abbott GM Diesel, Inc., including my right to pursue the lawsuit which was filed in the District Court of Fourth Judicial District in and for Utah County, State of Utah, on the 17th day of April, 1969, entitled Hal E. Holmstead vs. Abbott GM Diesel, Inc., Civil No. 33,121."

Both parties filed written memorandums in support of their respective positions with the lower court, and on September 18, 1970 District Judge Joseph E. Nelson denied the Motion for Summary Judgment (R. 61). Defendant thereupon filed its petition for intermediate appeal (R. 64-66), which was granted January 8, 1971 (R. 63).

ARGUMENT

POINT I

THE COVENANT NOT TO SUE IN FAVOR OF AGENT, GIDEON ALLEN OPERATES AS A RELEASE OF THE EMPLOYER WHOSE LIABILITY, IF ANY, IS WHOLLY DERIVATIVE.

It is clear that the liability here sought to be fastened upon appellant is purely derivative under the doctrine of respondeat superior. The alleged negligence is that of the agent. The employer's liability, if any, must arise solely because of the employment relationship since no

active or independent negligence on the part of the employer is or could be shown under the facts here involved. *Salt Lake City v. Schubach,* 108 Utah 266, 159 P.2d 149 (1945); 53 Am. Jur. 2d 416, Master & Servant §408.

Cases which have considered the precise question here involved have held that where liability of a master or principal for a tort committed by his servant or agent arises solely under the doctrine of respondeat superior, the injured person's covenant not to sue the servant or agent operates to release the master or principal from liability. Annotation, Release of (or Covenant Not to Sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 ALR 2d 533, Section 7, p. 552-555, as supplemented in ALR 2d Later Case Service.

In *Holcomb vs. Flavin,* 216 N.E. 2d 811 (Ill. 1966), a case very similar factually to the present case, the Supreme Court of Illinois held that a covenant not to sue the agent, in which no mention was made of the employer, was a bar to the injured party's claims against the employer. The court's opinion in that case is instructive here, so is quoted at some length.

> "The covenant herein is a standard covenant not to sue containing no reservations of rights againt others and provides that 'this instrument is and shall be construed as a covenant not to

sue as distinguished from a release.' No mention is made in the covenant of the defendants in this suit.

"The appellate court specifically rejected the view recognized by a number of cases from other jurisdictions. In those cases the courts, although recognizing the distinction between a release and a covenant not to sue as applied to joint tort-feasors generally, have taken the view that where the only liability of master or principal arises under the doctrine of *respondeat superior,* the injured person's covenant not to sue the servant operates to release the master or principal from liability. The rationale of these cases is based either upon the theory that such a result will avoid circuity of action or that since the liability of the master or principal is merely derivative and secondary, exoneration of the servant removes the foundation upon which to impute negligence to the master or principal. Anno: 92 A.L.R. 2d 552, et seq.

"A leading case on the subject is *Karcher vs. Burbank,* 303 Mass. 303, 21 N.E. 2d 542, 124 A.L.R. 1292, where the court stated:

> 'The Company's (employer's) liability is of a derivative or secondary character, resting solely upon the doctrine of respondeat superior. *Pangburn vs. Buick Motor Co.,* 211 N.Y. 228, 234, 103 N.E. 423. The company was, in effect, the plaintiff's (employee's) surety, and could, therefore, recover over against him if compelled to pay

> damages for his negligence while he was acting as its agent within the scope of his authority. *Kramer vs. Morgan,* 2d Cir. 85 F.2d 96. See *Pittsley vs. Allen* (297 Mass. 33), 7 N.E. 2d 442. It is a principle of the law of suretyship that a release or covenant not to sue the person known by the covenantor to be the principal will discharge the surety.'

"A similar view was taken by the Court of Appeals for the Eighth Circuit in *Bacon vs. United States*, 321 F. 2d 880, where the court stated:

> 'As the Missouri Supreme Court said in Max, (*Max vs. Spaeth,* 349 S.W. 2d 1) the master's liability under the doctrine of respondeat superior is based not on his own misdeeds but those of his servant, and "therefore, when the servant is not liable, the master for whom he was acting at the time should not be liable." It matters little how the servant was released from liability; as long as he is free from harm, it appears to us that his master should also be blameless' (covenant not to sue executed by tort victim in favor of servant tort-feasor).

"In *Stewart vs. Craig,* 208 Tenn. 212, 344 S.W. 2d 671, the court in a similar situation involving a covenant not to sue the servant pointed out that if a judgment were obtained against the employer based upon the employee's negligence, the employer would be entitled to sue the em-

ployee and obtain the same judgment against him. Since the plaintiff had given the employee the covenant not to sue, the employee would be then entitled to judgment against the plaintiff as was originally obtained in the action against the employee, thus completing the circuit and the parties would come out in the same position as when they started. The court, therefore, held that a covenant not to sue the servant extinguishes the cause of action against the wrong-doer and therefore extinguishes the cause of action against his superior.

"See also *Land vs. United States* (D.C. Okl.), 231 F. Supp. 383, 385; *Max vs. Speath* (Mo. Supp.), 349 S.W. 2d 1, 6; *Jacobson vs. Parrill*, 186 Kan. 467, 351 P.2d 194, 196; *Barsh vs. Mullins* (Okl.), 338 P. 2d 845, 848; *Bergeron vs. Gifford-Hill* (Ga.), 137 So. 2d 63; *Camal Insurance Co. vs. Wascom* (La. App.), 148 So. 2d 89, 90; *Smith vs. South and Western R. Co.*, 151 N.C. 479, 66 SE. 435; *Kelly vs. Ford Motor Company*, 104 Ohio App. 185, 139 N.E. 2d 99.

"In the case at bar the trial court recognized that if the defendants would have to respond in damages, they could sue their alleged employee, the covenantee, for the amount they had to pay. The employee would then have to respond in the very damages which the covenant was supposed to guard against. The contrary result reached by the appellate court herein would certainly involve an undesirable circuity and multiplicity of actions.

> "The appellate court stated that when Barnard paid for the covenant, he is presumed to know that if the plaintiff recovered from his employers they, in turn, would seek indemnity from him. Considering the conflict in the cases we do not believe that the appellate court could fairly indulge in such a presumption. If the appellate court conclusion is correct, there is a serious question as to what Barnard got for his $16,000, for he certainly did not buy his peace if he may still ultimately be liable to his employer. We believe a more logical and satisfactory result is reached by our holding in accordance with the majority view, that the covenant not to sue the servant or agent releases the master or principal and we so hold. In line with the cases hereinbefore cited a circuity of action will be avoided and since the liability of the master or principal is merely derivative and secondary, the exoneration of the servant or agent prevents the imputing of negligence to the master or principal."

The holding of the *Holcomb* case was reaffirmed in *American Nat. B. & T. Co. vs. Pennsylvania Railroad Co.*, 238 N.E. 2d 385 (Ill. 1968), where the Illinois Supreme Court stated:

> "As in the *Holcomb* case the plaintiff settled his case based on the Milwaukee's negligence for $75,000.00 and executed a covenant not to enforce the judgment against it. The covenant in this case must operate just as the covenant in the *Holcomb* case. *** The relationship between the defendants and the Milwaukee in this suit, therefore, is precisely the same as that between the

> driver and his employers in the *Holcomb* case. The sole issue before this court is whether the execution of a covenant not to enforce the judgment against an agent or servant operates to extinguish a claim against the principal or master, whose liability, if any, arises under the doctrine of respondeat superior. The answer must be in the affirmative."

In the case of *Stewart vs. Craig,* 344 S.W. 2d 761 (Tenn. 1961), cited in the *Holcomb* case, the injured party, in consideration of the payment on behalf of the agent of $16,000.00, executed a covenant not to sue. In a suit subsequently brought against the employer the Supreme Court of Tennessee held, as noted in the *Holcomb* case, that a covenant not to sue the servant extinguished the cause of action against the master.

In *Simpson vs. Townsley,* 283 F. 2d 743, (10th cir. 1960), 92 A.L.R. 2d 526, the plaintiff was injured in an automobile accident which was alleged to have resulted from the negligence of the agent, servant or employee of the defendant employer. The plaintiff, in consideration of the payment on behalf of the agent of $10,000.00, executed and delivered a covenant not to sue the agent. Thereafter suit was filed against the employer, based upon the alleged negligence of the agent. A motion for summary judgment on behalf of the defendant was granted and on appeal it was sustained. The Tenth Circuit Court of Appeals there noted:

"It is clear that Simpson's alleged cause of action is based on the doctrine of respondeat superior. His complaint contains no allegations of negligence on the part of the Tribune partnership, or corporation, of Goldenbelt. Rather, it alleges that 'the negligence of Meda Oneida Smith is likewise the negligence of the defendants . . .'

"Under the law of Kansas there is no distinction between the liability of a principal for the tortious acts of his agent and the liability of a master for the tortious acts of his servant. In both relationships the liability is grounded upon the doctrine of respondeat superior. Under that doctrine the liability of the master to a third person for injuries inflicted by a servant in the course of his employment is derivative and secondary and that of the servant is primary. Where the liability of the master is not predicated on any delict on his part, but solely on his secondary liability under the doctrine of respondeat superior, the exoneration of the servant removes the foundation upon which to impute negligence to the master.

"Moreover, under the law of Kansas, while a master whose liability is predicated solely on the doctrine of respondeat superior and not on any wrong on his part may be sued jointly with his servant for a tort committed by the latter within the scope of his employment, they are not joint tort feasors in the sense they are equal wrongdoers. Where a master becomes liable to a third person for personal injuries caused solely by the act of his servant, under the doctrine of respond-

eat superior, and is required to respond to such third person in damages by reason of such liability, he will be subrogated to the rights of the injured third person and may recover over from his servant who is primarily liable. In distinguishing the nature of the liability of the servant and of the master, in *Jacobson vs. Parrill*, 186 Kan. 467, 351 P. 2d 194, 199, the Kansas Supreme Court said:

> 'Basically, there is no distinction to be drawn between the liability of the principal for the tortious acts of his agent and the liability of a master for the tortious acts of his servant. While reference here is made only to the relation of master and servant, it also pertains to the relation of principal and agent. In either instance, the liability is grounded upon the doctrine of respondeat superior (2 Am. Jur, Agency, § 359, p. 278; 77 CJS Respondeat Superior pp. 317-320). It has been held that under that doctrine the liability of the master to a third person for injuries inflicted by a servant in the course of his employment and within the scope of his authority, is derivative and secondary, while that of the servant is primary, and absent any delict of the master other than through the servant, the exoneration of the servant removes the foundation upon which to impute negligence to the matter . . .'''

In *Terry vs. Memphis Stone and Gravel Co.*, 222 F. 2d 652 (6th Cir. 1955) the injured party for valuable

consideration signed a covenant not to sue the agents. The Sixth Circuit Court of Appeals there held:

> "Appellant, for a substantial and valuable consideration, signed a covenant not to sue the truck owner, Sullivan, or the truck driver, Hyatt. Inasmuch as the liability alleged against the appellee company rested solely upon the averment that the truck driver was the servant or agent of the appellee company for whose negligence it would be responsible upon the principle of *respondeat superior,* a covenant not to sue the truck owner and the driver — appellee's alleged agents — would necessarily release appellee. The case is clearly distinguishable from those cases in which a covenant not to sue one joint tort-feasor does not protect another joint tort-feasor from an action for damages brought against it by an injured party."

In *Karcher vs. Burbank,* 21 N.E. 2d 542 (Mass, 1939), 124 A.L.R. 1292, a covenant not to sue executed by the injured party in favor of the agent was held to bar an action against the principal. The court there stated:

> "The principal and his agent are liable in separate actions to a third person for the agent's negligent acts committed within the scope of his authority, both of which actions may be pursued until one satisfaction is obtained."
>
> * * *
>
> "In the case at bar, if the company is chargeable with the negligence of the plaintiff, it is only

> because his negligence is imputed to it by a rule of law; and if, because of his negligence, the defendants were injured and the company is compelled to pay damages, the plaintiff will be bound to reimburse it."
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> * * *
>
> "It is a principle of the law of suretyship that a release or covenant not to sue the person known by the covenantor to be the principal will discharge the surety."
>
> * * *
>
> "Whether or not the defendants knew of the relationship between the plaintiff and the company when the covenant was entered into, they must have known, on the record that is before us, that any claim they might then have against the company on account of the plaintiff's negligence would be of a derivative character."

It is respectfully submitted that, in view of the foregoing authorities which represent the great majority of decisions that have considered the question here involved, that plaintiff's execution and delivery of the covenant not to sue the agent, Gideon Allen, operates to extinguish and bar any claim against his employer, Abbott GM Diesel, Inc.

In plaintiff's written memorandum filed with the lower court it was contended that under Utah law an

employer would have no right of indemnity over against an employee for simple negligence such as is involved in the instant case (R. 41). Such right of indemnity, however, is a matter of simple hornbook law as will be noted in 42 C.J.S. 896-98, Indemnity, § 21, for example where it is stated:

> "It is a well-recognized rule that an implied contract of indemnity arises in favor of a person who without any fault on his part is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, the former having a right of action against the latter for indemnity, provided they are not joint tort feasors in such sense as to present recovery, as dicussed infra Subsec. 27. This right of indemnity is based on the principle that everyone is responsible for his own negligence, and if another person has been compelled by a judgment of the court having jurisdiction to pay the damages which ought to have been paid by the wrong-doer they may be recovered from him. It exists independently of statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular legal duty not to be negligent."
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> * * *
>
> "An agent or employee is liable to his principal or master for damages which the latter was compelled to pay to third persons solely because of the negligence or other wrongful act of the agent or employee; and it is no defense to the servant that other persons were also culpable."

The case of *Salt Lake City vs. Schubach,* (Utah 1945), 159 P.2d 149, 108 Utah 266, supports this general equitable rule that one whose negligence is passive and derivative has a right of recovery over against the active tort-feasor. In *Stewart vs. Craig,* 344 S.W. 2d 761 (Tenn., 1961), the Tennessee Supreme Court stated that:

> "The rule of law in this state, and universally so far as we know, that where the master (defendants in this case) is held liable for negligent acts of his servant (convenantee) solely upon the doctrine of *respondeat superior,* the master in turn has a cause of action against the servant for any such amount for which he is held liable."

The recent case of *Employers' Fire Insurance Company vs. Welch, et al.* (N.M. 1967), 433 P.2d 79, 78 N.M. 494, also supports the general rule. In this case the New Mexico Supreme Court specifically held that an employer found liable on the theory of respondeat superior may recover indemnification from the employee when there is no active negligence on the part of such employer. See also *Hancock vs. Berger,* cited *infra.*

POINT II

THE DECREE OF REFORMATION CAN HAVE NO EFFECT ON THE PRESENT ACTION BECAUSE DEFENDANT WAS NOT MADE A PARTY TO THE ACTION FOR REFORMATION.

It is a well established principle of law that all persons who have a known interest must be made parties to any suit for reformation of an instrument in order to be bound by the proceedings. As stated in 45 Am. Jur. 642, Reformation of Instruments, Sec. 93:

> "Suits to reform written instruments are subject to the general rule in Chancery that all persons interested in the subject matter of litigation, whether it is a legal or equitable interest, should be made parties, so that the court may settle all of their rights at once and thus prevent the necessity of a multiplicity of suits. As a general rule, therefore, all persons to be affected by the proposed reformation must be made parties."

This rule is salutary in its effect because courts should not deal lightly with the solemnly expressed terms of a written instrument. Much stronger and clearer evidence is required to permit a reformation than in an ordinary action for damages. See 45 Am. Jur. 651, Reformation of Instruments, § 116. Only where all known interested persons are represented in the reformation proceeding can there be assurance that all relevant evidence is made available to the court, in aid to its decisions.

That the employer has a recognized legal interest in a covenant not to sue executed in favor of the em-

ployee tortfeasor is clear from 4 Corbin on contracts 747-48 which states:

> "An employer may be liable for tortious injury caused by his employee, solely by the doctrine respondeat superior, as the best method of carrying risks and compensating the injured. The employer may then be held to have a right to full indemnity against the active wrongdoer. In such a case, settlement by which the injured party covenants with the active wrongdoer that he shall not have to pay anything more on account of the injury might be held, by analogy with contract suretyship, to operate as a complete discharge of the employer. Such should certainly be the holding, if the injured party covenants with the active wrongdoer that he will not thereafter bring any action to press any claim, either against the covenantee or against anyone else. If, in breach of this covenant, the injured party brings suit against the employer, the latter should have a defense as a third party beneficiary; and the covenantee himself should be able to enforce the covenants specifically by injunction."

In the case of *Atlantic Coast Line R. Co. vs. Boone*, 85 So. 2d 834, 57 A.L.R. 2d 1186 (Fla. 1956), the railroad successfully asserted a release executed between the plaintiff and a negligent driver of another automobile on the theory that it was a third party beneficiary. *Atlantic Northern Airlines vs. Schwimmer*, 96 A. 2d 652, 12 N. J. 293 (1953), similarly held that a valid release of all claims arising out of the transaction against all

persons connected therewith given by the plaintiff was pleadable as a defense by other persons not parties to the instrument. See also *J. A. Leigerber, et al. vs. Scott,* 83 So. 2d 246 (Ala. S.C., 1955), where in an equity suit by the guardian of an incompetent for reformation of a deed, the court held that all persons whose interests in the subject matter, legal or equitable, who would be immediately or consequentially affected by the decree were necessary parties in a suit for reformation.

The foregoing rule should apply with full force under the facts of the present case in which the defendant's direct interest in the covenant not to sue was well known, the covenant having been specifically raised as a bar to the present suit, and in which the Decree of Reformation was thereafter entered upon default without defendant having been joined as a party. Such deliberate disregard of defendant's vital interest in an attempt to unilaterally circumvent the effect of the covenant not to sue which defendant had no part in preparing or executing, cannot be permitted. In order to be bound by the decree, defendant must have been made a party to the reformation suit so that it could be represented on the issues involved rather than having the matter settled on the basis of a default. Defendant not having been made a party to the reformation suit, the Decree of Reformation can have no effect in the present case and should be entirely disregarded.

POINT III

THE COVENANT NOT TO SUE COULD NOT PROPERLY BE REFORMED TO INCLUDE A RESERVATION NOT CONTAINED IN THE ORIGINAL COVENANT AS EXECUTED.

Plaintiff's attempt to reform the covenant in the manner attempted in the reformation suit is invalid and improper. Applicable cases have so held.

For example, in *Muse vs. DeVito,* (Mass. 1923), 137 N. E. 730 it was held that where a release was absolute and unconditional it must be given full effect and could not be varied by parol evidence introduced to show that the plaintiff intended to reserve whatever rights she had against a joint tortfeasor. The defendant there had excepted to the admission of parol evidence as to what was said to the plaintiff by the attorney in whose presence the release was signed and as to her intention at the time to reserve a right of action against others who might be legally responsible.

In *Reid vs. Lowden* (La. 1939), 189 So. 286 it was held that where there was nothing in a written compromise settlement and release to show that the plaintiff intended to reserve his rights against another tortfeasor and there was no ambiguity, parol evidence was not admissible to prove the alleged reservation. The Court

there stated that since the parties had reduced their agreement of settlement and discharge to writing and since the writing contained no reservation of rights, the plaintiff was bound by the agreement and could not alter or change it by parol evidence.

In *Freedman vs. Montagne Associates, Inc.* (N.Y. 1959), 187 N.Y.S. 2d 636 it was held that a release could not be varied by parol evidence to show that the plaintiff was releasing only his interest in commissions.

As can be noted from the foregoing cases, the plaintiffs cannot, after having settled their claims against the employee Gideon Allen by a clear, complete and unambiguous instrument, later attempt to vary the clear terms of that instrument by parol evidence and change it on a default decree from a sow's ear into a silk purse. So even if defendant had been made a party to that suit, the covenant was and is not subject to reformation in the manner attempted by plaintiff.

POINT IV

THE COVENANT NOT TO SUE, EVEN AS REFORMED, IS A BAR TO THE PRESENT SUIT.

Assuming, without conceding, that the reformation decree were valid and binding on defendant, the Covenant not to Sue Gideon Allen, even as reformed, would

still be a bar to the present suit against his employer, under the majority and best-reasoned cases that have ruled on the precise issue involved.

In *Barsh vs. Mullins* (Okla. 1959), 338 P.2d 845, the plaintiff had settled with the driver and executed a release and covenant not to sue in which claims were expressly reserved as against persons not specifically referred to in the release and covenant not to sue. The Court there held that, notwithstanding the express reservations, the release and covenant was a bar as to all persons and entities whose liability was derivative in nature. The Court stated:

> "(5) If this were a case involving ordinary joint tortfeasors, each guilty of independent and concurring negligence, it is clear that a release of this type would not realease those joint tortfeasors not named. All American Bus lines vs. Saxon, 197 Okl. 395, 172 P. 2d 424. In such cases primary consideration is given to the intent of the person executing the release. If, however, the claimed liability of defendants for the negligent acts of Hall and Barsh Produce Co. is derivative in nature, a different rule is applicable.
>
> "In Ford Motor Co. vs. Tomlinson, 6 Cir., 229 F.2d 873, 877, the court pointed out that under Ohio law an injured person could ordinarily release one joint tortfeasor and later recover from the remaining tortfeasors if the right to do so was expressly reserved in the release. But the court further said:

> '. . . in Ohio the release of a tort-feasor primarily liable ordinarily operates to release one secondarily liable, regardless of an attempt to reserve rights against the latter. Hillyer vs. City of East Cleveland, 1951, 155 Ohio St. 552, 99 N.E. 2d 772. See Terry vs. Memphis Stone and Gravel Co., 6 Cir., 1955, 222 F. 2d 652 . . . .'

"In one of the cited cases, Terry vs. Memphis Stone & Gravel Co., the court used the following language (222 F. 2d 653):

> 'Appellant, for a substantial and valuable consideration, signed a covenant not to sue the truck owner, Sullivan, or the truck driver, Hyatt. Inasmuch as the liablity alleged against the appellee company rested solely upon the averment that the truck driver was the servant or agent of the appellee company for whose negligence it would be responsible upon the principle of respondeat superior, a covenant not to sue the truck owner and the driver — appellee's alleged agents — would necessarily release appellee. The case is clearly distinguishable from those cases in which a covenant not to sue one joint tort-feasor does not protect another joint tort-feasor from an action for damages brought against it by an injured party.'

"In Giles vs. Smith, 80 A. App. 540, 56 S.E. 2d 860, 862, the court said:

> 'Where the liability, if any, of the master to a third person is purely derivative and dependent entirely upon the principle of respondeat superior, and although not technically a joint-tortfeasor, the master may be sued alone or jointly with the servant on the merits (and by analogy, a release of the servant from liability, 35 Am. Jur. 963, 534) will bar an action against the master, where the injury and damages are the same.'

> "We have recognized and applied the rules hereinabove announced. In Mid-Continent Pipeline Company vs. Crauthers, Okl., 267 P.2d 568, 571, the plaintiff executed a release and covenant not to sue in favor of defendant's agents for a consideration of $300. Therein, as in the case before us, the release expressly reserved a right of action against any other persons who might have caused or assisted in causing plaintiff's damage.

> * * *

> "We held that the release of the agent released the principal and reversed with directions to enter judgment for defendant.

The Court held that the defendant's liability, if any, was derivative in nature, and concluded:

> "It therefore follows that the release of those who were guilty of the primary negligence extinguishes the liability of the other conspirators."

Barch vs. Mullins, supra, held that the master is not a joint tort-feasor, and that a release of the servant, whatever the intent or attempted reservation, of necessity releases the master.

In *Williams vs. Marionneaux* (La. 1960), 124 So. 2d 919, the Louisiana Supreme Court in a well-reasoned opinion held that an employer was released by a covenant not to sue executed between his employee and the injured party, notwithstanding an express reservation of rights as to the employer contained in the covenant. This was a suit for injuries caused by a pipe protruding from a passing logging truck. The employer, Marionneaux, filed a third party complaint against its employee, Blanchard, claiming indemnity for any loss it might sustain as a result of the employee's primary negligence. Blanchard then filed a third party complaint back against plaintiff Williams, pleading the covenant not to sue obtained by him from the plaintiff and thus completing the circle.

The court there found that the master's liability was based solely on the doctrine of respondeat superior, that he therefore could not be considered a joint tort-feasor, and that his liability was secondary to and dependent upon that of the servant.

The court reasoned as follows:

"Since Marionneaux had the right to recoup from Blanchard whatever damages he might have been obliged to pay plaintiff for injuries resulting from Blanchard's negligence while the latter was acting in furtherance of his duties as Marionneaux's employee, the question arises as to the legal effect produced by the compromise and settlement by plaintiff of his claim against Blanchard, in which he covenanted to indemnify and save Blanchard harmless for all claims and demands for damages growing out of the accident. This release, in our view, not only operated to discharge Blanchard as the party primarily responsible; it effected a complete release of Marionneaux, who was only secondarily liable. And this, despite the attempted reservation by plaintiff in the release of all his rights against Marionneaux and his liability insurer."

* * *

"Now, when Blanchard compromised with plaintiff, he repaired his wrong and, therefore, was fully acquitted from further liability. This acquittance inured to the benefit of Marionneaux for the release of the tort-feasor must be held to release Marionneaux also from further responsibility, as his liability for the tortious act was vicarious in nature and derived solely from his legal relation to the wrongdoer.

"To give legal effect to the reservation contained in the release, as plaintiff would have us do, would produce consequences of a most unseemly nature — for, notwithstanding that the tort-feasor has already repaired the wrong

> conformably with Article 2315, Marionneaux would be entitled to reimbursement from Blanchard, as the party primarily responsible, and Blanchard, in turn, would be entitled to indemnification from plaintiff as he contractually agreed to save Blanchard and his insurer harmless for all claims and demands for damages on account of the accident." 124 So. 2d 921-923.

A similar result was reached in a case involving an attempted reservation of rights against a municipality incident to execution of a covenant not to sue the primary, or active, tort-feasor, in *Lee v. City of Baton Rouge* (La. 1962), 141 So. 2d 125. The court there carefully distinguished between the liability of joint tort-feasors and that of a passively-negligent governmental entity and concluded that such attempted express reservation of rights against the governmental entity was ineffective. It stated:

> "As counsel for defendants have aptly put it, 'We would have an endless circle of legal futility.
>
> "In addition to the above argument that allowing plaintiff to proceed with this suit would only result in an endless circle of legal futility, we find many authorities holding that release of the primary obligor also discharges the secondary obligor because this result is inescapable under the laws of subrogation. It is elementary that where the claimant sues only the party secondarily liable he is then subrogated to the rights of the claimant and legally stands in his shoes. He

> has all of the rights, but is also subject to all of the limitations of the surbrogator." 141 So. 2d 125, 133.

The rule of the above cases also applies in suretyship law. *Slatoff vs. Theurich* (N.J. 1938), 199 A. 49, 123 N. J. Eq. 593.

As noted in the foregoing cases, the injustice of permitting the injured person's claim to be indirectly asserted against the employee through the employer is just as much present in cases of an attempted reservation as in cases where no reservation is attempted. So in addition to the advantages of a logical and consistent application of the respondeat superior doctrine, the rule releasing the employer under the present facts also avoids the double exposure of the employee to liability with its attendant expense, circuity of action and multiplicity of suits.

In this case, if reformation of the original covenant is permitted, and the reservation therein held to be effective, any loss incurred by Abbott GM Diesel, Inc. after execution of the release by Gideon Allen would entitle it to be reimbursed from its employee, Gideon Allen, for all sums it was required to pay. Gideon Allen, in turn, could then maintain a claim back to the plaintiff for breach of the covenant given to him. The rule making the covenant not to sue a bar, despite an attempted reservation as to the employer, logically prevents this

"circle of futility" from occurring and preserves to the employee the peace for which he paid $10,000 to plaintiff. By the covenant plaintiff promised and agreed "never to make any demand or claim, or commence or cause or permit to be prosecuted any action at law or in equity, or any proceeding of any description against Gideon Allen." Yet by pursuing his claim against Abbott GM Diesel, Inc., Gideon Allen will be subject to further liability contrary to the covenant provisions.

In the lower court plaintiff relied upon two New York lower court cases which upheld a reservation of rights in covenants not to sue against persons liable only under the doctrine of respondeat superior. The case of *Wilson v. Econom* (1968) 56 Misc. 2d 272, 288 NYS 2d 381, involved a malpractice action against an attorney. In one sentence the court without explanation or citation to authority found a reservation of rights against all other parties except the attorney himself was valid.

The second case, *Wilson v. City of New York* (1954) 131 NYS 2d 47, involved a private citizen who sued New York City for an alleged assault upon him by a police officer. The Supreme Court for Kings County, trial term, in its opinion did not discuss the problem of circuity of action and multiplicity of suits inherent in allowing the action against the master after release of the servant.

The California case of *Ellis v. Jewett Rhoades Motor Company* (1939), 29 Cal. App. 2d 395, 84 P.2d 791, a case cited in the *Wilson* case *supra,* and also extensively quoted by plaintiff in the lower court brief (R. 41-42) is distinguishable from the present case because there the particular covenant not to sue given to the employee for consideration did not by its terms protect him from a subsequent indemnity claim by the employer. The court there stated:

> "In the instant case Jewett, knowing he might in the future be compelled to meet a demand for reimbursement by appellant, agreed that respondent should retain his right to proceed against appellant."

The court in *Ellis, supra,* distinguished an Ohio case, *Bello v. City of Cleveland,* 106 Ohio St. 94, 138 N.E. 526, on the basis that the intention of the persons receiving the covenant not to sue in *Bello* was that they would not further be subject to a suit by the city on an indemnity theory.

A second case, *Brown v. Town of Louisburg,* 126 N.C. 701, 36 S.E. 166, 78 Am. St. Rep. 677, was also distinguished by the court in *Ellis* on the basis that the covenant given there protected the employee both directly and indirectly from future exposure. The *Brown* case was explained as follows:

> "The court held that Ponton (the party paying) must be protected in his right under the contract, and he could not be protected if the city of Louisburg were called to recover from him whatever damages it might be compelled to pay plaintiff. Such an effect would be a complete destruction of his right under his contract with plaintiff." 84 P.2d 791, 793.

The ruling in *Ellis,* supra, would be harsh unless the employee or agent paying for a covenant not to sue expressly and unequivocally agrees and understands that his attempt to "buy his peace" may be rendered a nullity should his employer be further held responsible and then comes back against him. The covenant not to sue given to Gideon Allen purports to settle completely his exposure regarding the accident in question in the following language:

> "I do hereby covenant and agree . . . never to make any demand or claim, or commence *or cause or permit to be prosecuted any action at law or in equity, or any proceeding of any description, against Gideon Allen* (for injuries . . . sustained) . . . in consequence of an accident that occurred on or about the 6th day of December, 1968, at or near Lehi, Utah.
>
> * * *
>
> "I understand that the parties to whom this covenant extends admit no liability of any sort by reason of said accident and that *the payment*

> *above recited is made to terminate further controversy respecting all claims for damages that I have heretofore asserted or that I or my personal representatives might hereafter assert against Gideon Allen because of said accident.*" (R 32-33). (Emphasis added.)

The foregoing provisions are inconsistent with and contradictory to the paragraph added in the decree of reformation which purported to reserve as against the defendant in the present suit and would, if valid, subject the employee to further liability to the employer, contrary to the provisions of the covenant quoted above.

The Federal case of *Bacon, et al. v. United States,* 321 Fed. 2d 880 (8th Cir., 1963), involved a similar problem of interpreting an ambiguous covenant not to sue. In that case an action was brought against the United States under the Tort Claims Act for injuries sustained in a collision in Missouri between an automobile owned by the plaintiffs and an automobile owned by the United States and driven by one of its employees. The employee and his personal insurer settled with the plaintiffs and received a covenant not to sue, which specifically reserved the plaintiffs' claim for the damage done to their automobile as a result of the accident and specifically reserved all claims against the United States. In a subsequent suit against the United States, the Government pleaded that it was released by virtue of the covenant, notwithstanding the reservation. Both the federal district court and the 8th Circuit agreed that the cov-

enant not to sue was contradictory by its own terms, presumably because the master, if sued, could claim indemnity back against the employee and indirectly result in further liability to the employee. The court found that the instrument, regardless of the attempted reservation of rights against others, completely released the government from any liability to the plaintiff.

Another case relied upon by plaintiff in the lower court is *United States v. First Security Bank,* 208 F.2d 424 (10th Cir. 1953). That case involved a suit commenced in the Central District of Utah against the United States under the Federal Tort Claims Act for injuries sustained when Mardis, a mail carrier, allegedly retarded the speed of his automobile causing the driver following him to jack-knife a house trailer he was towing into the opposite lane and against an approaching car. Judge Ritter entered judgment for the plaintiffs, and that judgment was sustained on appeal.

The Court of appeals there, however, noted that under the provisions of 28 U.S.C. 2676 the U.S. Government had no right of indemnity or subrogation against the employee, a significant distinction from the present case. The court there then erroneously concluded that an employer and his employee although not joint tortfeasors "in the sense that their joint acts caused an injury" are nevertheless jointly and severally liable and that the "law of joint tortfeasors relating to releases

and covenants not to sue is applicable." Such a conclution fails to recognize the basic nature of the employer-employee relationship as explained in the cases above. This Court in *Salt Lake City v. Schubach, supra,* announced the law of Utah with regard to the relationship between one whose negligence is active and another whose negligence is passive or secondary:

> "Notwithstanding the city's liability to the public, it was under no duty to notify appellant of a condition of appellant's own creation. *It was not a wrongdoer as between itself and appellant. The city and appellant were not in pari delicto; they were not joint tortfeasors.* (Emphasis added.)

In reaching its decision, the Federal Court overlooked the *Schubach* case and believing this Court had not ruled on the issue, that it was free to make its own interpretation as to Utah law. That erroneous interpretation is not binding on this Court.

Further it will be noted that two other Federal Circuit Courts have ruled on the effect of a covenant not to sue with reservation against the United States under the doctrine of respondeat superior, each with a different holding than that in the *First Security Bank* case. The case of *Bacon vs. United States, supra,* by the 8th Circuit ten years after the *First Security Bank* case, found that under Missouri law a covenant not to

sue given to an employee also released the United States, even though a specific reservation was contained in the covenant. Plaintiffs argued that 37 R.S. Mo. § 537.060 (V.A.M.S., 1949 Ed.) provided (as does Utah) that a covenant not to sue a joint tortfeasor may expressly reserve plaintiff's claim against other joint tortfeasors. The court, however, adopted the general rule that where the master can be held liable only under the theory of respondeat superior, he is not a joint tortfeasor. The court reasoned that when the servant is released, the master for whom he was acting at the time should also be released. The court referred to the *First Security Bank* case, *supra,* but declined to adopt its ruling that "the law of joint tortfeasors relating to releases and covenants was applicable to respondeat superior situations."

The Federal case of *Munson vs. United States,* 380 F.2d 976 (6th Cir. 1967), was brought under the Federal Tort Claims Act against the United States as a result of an automobile accident involving a Government employee. The employee settled separately with the plaintiff, and received a covenant not to sue specifically reserving to the plaintiff a cause of action against the United States. A Motion by the United States for Summary Judgment was granted by the lower court, construing Ohio law. On appeal, the 6th Circuit reversed, but did so on the ground that suits against the United States did not involve the usual employee-employer situation.

The court there acknowleged the distinction between cases involving joint tortfeasors and cases involving derivative liability:

> " . . . the authorities on the subject emphasize that the reason for such a rule was to protect the normal right of indemnity which the master holds by subrogation to any judgment rendered him in favor of the plaintiff.
>
> * * *
>
> "In the case of a settlement with the servant, no indication of the servant's liability is given and there is no reason to release the master except to protect him from having to bear the full burden of plaintiff's remedy when his rights against the servant are destroyed."

The court in *Munson* concluded that, because the United States Supreme Court in *United States vs. Gilman,* 347 U.S. 507, 74 S. Ct. 695, 98 L. Ed. 898 (1954), had specifically held the Federal Tort Claims Act did not place the Federal Government in the shoes of a common law employer, it did not therefore have the common law right of indemnity against a negligent employee normally accorded any employer whose negligence is purely vicarious and the reason for construing the covenant to release the United States from liability had ceased to exist. That rationale should not be applied where, as here, the right of indemnity of the employer

Abbott GM Diesel still exists in full force. The *Munson* case reinforces the general rule by noting the distinctions which apply in claims under the Federal Tort Claims Act.

As pointed out in the foregoing discussion, the *First Security Bank* case erroneously interprets the rule which should apply under the facts of the present case. It is not binding as precedent on this Court. The better rule, as outlined in the cases cited above, releases the employer where a covenant not to sue is executed in favor of the employee, whether or not there is an attempted reservation as against the employer. This is especially so where as here, the language of the covenant, as supposedly reformed, is inconsistent and contradictory and leaves the employee open to further liability.

CONCLUSION

The covenant not to sue executed by plaintiff in favor of the employee, Gideon Allen, for consideration operates as a release of the employer, Abbott GM Diesel, Inc. The attempt by plaintiff to reform the covenant to include an express reservation as against the defendant in this action can have no effect where, as here, the direct and substantial interest of defendant was known to plaintiff at the time the reformation suit was filed but defendant was not joined as a party. In any event the covenant was not subject to reformation in the man-

ner attempted by plaintiff. Finally, even if the covenant as reformed, were binding in this action, which defendant does not concede, it would, nevertheless, operate as a release of the defendant under the better reasoned cases, which represent the majority view. This Court should enter its order directing the entry of summary judgment in favor of the defendant.

Respectfully submitted,

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